IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 2634 OF 1997

Savarkar Prathisthan .... Petitioner

versus

Vinayak Gajanan Paranjpe & ors..... Respondent.

Shri S.B.Deshmukh for the petitioner
Shri A.P.Kulkarni for respondent no.1.
Shri M.H.Solkar AGP for Respondent no.2.

CORAM; A.P. DESHPANDE, J.
DATED; 9TH MARCH, 2007

JUDGMENT;

1. The present petitioner is the school management whereas the respondent no.1 is an Assistant teacher working in the said school. The conditions of service of the employees of the private school are governed and regulated by MEPS Act and the rules made thereunder.

2. The respondent no.1 was initially appointed on 20-6-1992. The said appointment order has not been placed on record. But it is undisputed that the respondent no.1 has worked in academic session 1992 and was again issued an order of appointment in the next academic session i.e. 1993-94 and he continued to work in the school till the end of academic session 1993-94. As the respondent no.1 was terminated from service from the end of academic session 1993-94 he

filed an appeal before the school tribunal, calling in question the legality and validity of the action of termination on the part of the petitioner. It appears from the judgment and order passed by the school tribunal that the order of appointment issued at the time of initial appointment was placed on record of the tribunal. The tribunal has observed in its judgment that pursuant to the initial order of appointment, the respondent no.1 has joined the school with effect from 20-6-1992 and it did not specify any date of the said appointment order. The order issued in the next academic session is placed on record, which describes the period of appointment to be with effect from 10-6-1993 to 30-4-1994. The appointment order issued in the year 1993 terms the appointment as temporary. On the basis of material placed on record of the tribunal, it has concluded that the appointment of the petitioner was in a permanent post and a clear vacancy and hence the same needs to be construed as appointment on probation. It will not be out of place at this juncture to point out that when this court issued rule in the present writ petition, the learned counsel appearing for the petitioner had conceded before the court that the post in which the first respondent was appointed was a substantive permanent post and that was a clear vacancy. It was also fairly conceded that the appointment of the respondent no.1 cannot be termed as temporary appointment. Hence no

interim relief was granted and the respondent no.1 continues to be in service for last 14 years.

3. To find out the real nature of appointment, my attention has been invited to rule 10 of the MEPS rules, which goes to define a temporary employee.

Rule 10 reads thus:

> 10(1) Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation.
>
> (2) A temporary employee is one who is appointed to a temporary vacancy for a fixed period.

4. Thus perusal of sub rule (2) clearly shows that a temporary employee is the one who is appointed to a temporary vacancy. Temporary vacancy would be a vacancy arising in permanent post for a temporary period. If this be the position in law, when the respondent no.1 pleaded that his appointment is not against the temporary vacancy, it was incumbent upon the present petitioner to have place material on record of the tribunal indicating the nature of the vacancy and as to how it has come into existence. No effort has been made by the petitioner even before

this court to point out the contingency in which the temporary vacancy had arisen, which in turn prompted the management to appoint the respondent no.1 in the said temporary vacancy. The tribunal has found in the first place that the first appointment order pursuant to which the respondent no.1 joined on 20-6-1992, does not mention the period of appointment, coupled with the fact that the respondent no.1 was continued in the next year also and hence itis held by the tribunal that the appointment was made on probation. I do not find any fault on the part of the tribunal in reaching the said conclusion that the appointment of respondent no.1 has to be treated as an appointment made on probation. If the appointment is made on probation, after following the prescribed procedure, then the employee so appointed needs to be regulated by the provisions of section 5 of the Act. Section 5 (2) reads thus:

> 5(2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of sub- sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

Sub section (3) then lays down that if:

In the opinion of the management, the work and behaviour of any probationer during the period of his probation, is not satisfactory, the management may terminate his service at any time, during the said period after giving him one months notice or salary of one month in lieu of notice.

5. Heavily relying on the provisions containing in sub section (3) the learned counsel for the respondent no.1 has submitted that the work and behaviour of the respondent no.1 was satisfactory and at no point of time he was issued any notice or memo in that regard. It is also contended by the learned counsel for the respondent no.1 that a certificate was issued to the respondent no.1 by Head Master of the school certifying that during his service tenure of two academic session, his work and behaviour has been satisfactory. Per contra, the learned counsel for the petitioner submits that the work and behaviour of the respondent no.1 was not satisfactory. It is pointed out that on 31-1-1994 the respondent no.1 was assigned some work in relation to the conduct of examination and petitioner had altercation with a lady teacher. On happening of the said event, the management had constituted three member committee to make preliminary enquiry for fact finding. On 2-2-1994 the respondent no.1 was instructed that he should stop attending the

school from today as an enquiry is being conducted touching the act of misconduct, alleged to have been committed by the respondent no.1. However, in a meeting held on 5-2-1994 it appears that the school committee considered the report submitted by three member committee and had resolved that it will not be in the interest of school and the management of school, so also the students to make an indepth enquiry in accordance with law touching the act of misconduct. It is then observed in the resolution that as the present respondent no.1 and the lady teacher with whom he had altercations, were not permanent employees the service of respondent no.1 could be brought to an end on expiry of the term of appointment. Ultimately the respondent no.1 came to be terminated from service on expiry of the term of appointment from the end of academic session 1993-94. The respondent no.1 construing the order dated 2-2-1994 as amounting to otherwise termination, filed an appeal before the tribunal.

6. As stated hereinabove, the tribunal having found that the appointment of respondent no.1 was in a permanent post and in the clear vacancy and on further finding that the work and behaviour of respondent no.1 was not shown to be unsatisfactory, has concluded that the termination effected from 30-4-1994 is unsustainable.

7. An additional submission is canvassed by the counsel for respondent no.1 and the same is to the effect that the order of termination is penal in nature, as the same has been passed with a view to punish the respondent no.1 for an act of misconduct allegedly committed by him on 31-1-1994 referred to hereinabove. In the submission of the respondent no.1, termination of service is based and founded upon the enquiry report submitted by three member committee and on perusal of it, the school committee took a decision to dispense with the service of respondent no.1 from the end of academic session. Gathering support from the communication dated 2-2-1994 the counsel for respondent no.1 has submitted that as the foundation for termination is an act of misconduct, the same cannot withstand the test of a valid termination, as no enquiry as contemplated by the rule, was made before termination. Per contra the learned counsel for the petitioner has submitted in the first place that the said ground was not raised before the tribunal and secondly it is submitted that the challenge on that count is devoid of any merit for the reason that at the most the incident that took place on 31-1-1994 could be termed as motive and not foundation. He has placed reliance on the judgment of Apex Court reported in **(1999) 2 S.C.C.page 21,** and the

Apex Court held in paragraphs 33 and 34 thus:

33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive in as much as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer, as stated by Shah, J. (as he then was) in Ram Narayan Das case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to find out if there is primafacie evidence or material to initiate a regular departmental enquiry. It has been so decided in Champaklal Case. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge memo issued, reply obtained, and an enquiry officer

is appointed - if at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadue case and in Benjamin case. In the latter case, the departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases, the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found,

and were merely the motive.

34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice in as much as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee -- even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases.

8. Having regard to the law laid down by the Apex court I am of the clear view that the termination order cannot be assailed successfully by the respondent no.1 on the ground that the order of punishment is penal in nature which is passed without holding any enquiry.

9. One more submission has been canvassed by the learned counsel for the respondent no.1, and the same hinges upon equity in the facts of the present case. The learned counsel for respondent no.1 submitted that the present petition is in the discretionary jurisdiction of this court and as the respondent no.1 is in continuous service of last 14 years, the statusquo ought not to be disturbed. It is pointed out that no interim relief was granted and the respondent no.1 continues to be in service. The submission is further buttressed by pointing out that during pendency of the present petition, all through out, not even once the respondent no.1's service has been found to be unsatisfactory. Hence it is submitted that this court should not interfere with the judgment and order passed by the tribunal.

10. As I have already concurred with the view taken by the tribunal, that the appointment of respondent no.1 needs to be construed as on appointment on probation being covered by section 5 of the act and

further for the reason that the respondent no.1 is in continuous unblemished service for last about 14 years, I do not feel it appropriate to exercise the discretion in favour of the petitioner in setting aside the order passed by the tribunal.

11. The learned counsel for the petitioner heavily relies upon the judgment of the Apex court reported in **Hindustan Education society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others reported in (1997) 5 S.C.C. page 152.** to contend that the petitioner's appointment is temporary in nature. Whereas the counsel for the respondent no.1 distinguishes the judgment in Hindustan Education soceity, taking support of the observations made by the learned Single Judge of this court in a judgment reported in **2005(4) Mh.L.J. page 485.** In the present case the initial appointment was not for a fixed period and on temporary basis. The ratio laid down in Hindustan Education Societie's case has no application to the facts of the present case for the reason that in the case before the Supreme Court the order of appointment indicated that the appointment was purely temporary for a period of 11 months from 11-6-1992 to 10-5-1993 in clear vacancy and it further stated that after expiry of the above period, services of appointee shall stand terminated without any notice. It is in

this background that the Hon'ble Apex Court has found that the appointment was of purely temporary nature and the approval given by the Competent Authority was also for that temporary appointment. It found that the procedure prescribed for permanent appointment as contemplated by section 5(1) and (2) has not been followed. It is in this background that the Hon'ble Apex Court has considered the issue and answered it. Thus, the facts considered by the Hon'ble Apex Court are entirely different and therefore said ruling has no application to this case. Here, the management has not pointed out the procedure followed while appointing respondent no.2 in service and does not state that the procedure as contemplated by sub-section (1) and (2) of section 5 has not been followed.

12. In the result, the writ petition fails and it is dismissed. Rule is discharged.

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